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Streamlining the Ohio Corporation —The 1939 Amendments

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Not many states can boast of legislative drafting commissions whose existence was created and sponsored by a state bar association to reframe the whole body of a field of law and whose continued existence has been sponsored to examine its interpretation by the courts, to hear complaints and suggestions from those having to deal with it, and to revamp it year by year as the need demanded. Such, however, has been the experience of Ohio in the field of private corporations. Prior to 1926 when the Committee on Corporation Law of the Ohio State Bar Association undertook to reframe the corporation laws, the statutes were a hodge-podge of amendments dating from the act of 1852 which was the first comprehensive Ohio act in this field.[1] The committee had hoped to be able to amend this statute but found it so hopelessly inadequate that complete revision was decided upon. The result was the General Cor-

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[1] The first general corporation act in Ohio was enacted in 1812. (10 O.L. 24) In 1816, the act was continued. (15 O.L. 6) But in 1824, it was repealed. (22 O.L. 423) In 1846, an act was passed authorizing incorporation of manufacturing and mining corporations. (44 O.L. 37) This act covered but three and one-half pages in the statutes.

poration Act of 1927.[2] While there have been important amendments since that time, the first extensive overhauling of the act occurred during the 1939 legislative session.[3] These amendments became effective on July 24, 1939, and it is upon the main features of these amendments that this discussion is directed.

It should be pointed out that the Ohio Corporation Act of 1927 was one of the first of the so-called modern statutes in this field. A good deal of spadework had to be done by the Committee outside the suggestions found in existing statutes in other states. Of the innovations and improvements made much has been written. Space does not permit even a bare summary of this important ground-work. So important was this statute that the several recent enactments of new corporation codes in other states have all gone to the Ohio act for suggestions and frequently for complete statement. The Corporations Committee examined these recent acts, accepted new ideas where they seemed practical, reframed old sections for greater clarity, and incorporated provisions to correct judicial interpretation that was not in accord with the original intent. The experience of a dozen years since the framing of the original has proved extremely valuable in this work.

While a number of new definitions have been added to Section 2 of the act,[4] the most important one was to correct a misapprehension of the Supreme Court as to the application of the appraisal section[5] to changes made by the majority of the "express terms and provisions" of the shareholder's contract. In *Johnson* v. *Lamprecht*,[6] the court in *dicta* had said that there

[2] 112 O.L. 9. See Address of Mr. Edwin J. Marshall, Chairman of the Committee on Corporation Law of the Ohio State Bar Association, at a meeting of the Cleveland Bar Association on November 15, 1938.

[3] 118 O.L. 47 *et seq.*

[4] G.C. sec. 8623-2. The new definitions cover the terms "incorporator," "to retire," "express terms and provisions," "redemption price of shares," "liquidation price," "domestic corporation," "foreign corporation," "state," "consolidation" and "consolidated." Subsection 17 now provides that "except as otherwise in this act provided, this act relates only to domestic corporations."

[5] G.C. sec. 8623-72.

[6] 133 Ohio St. 567, 15 N.E. (2d) 127 (1938).

was a right of appraisal to those making the proper demand where a new issue of prior preferred shares had been placed ahead of the already outstanding preferred. The court had assumed that this was a change of the "express terms and provisions" of the outstanding preferred shares and that, consequently, if there was substantial prejudice, the appraisal section applied.[7] The new defining clause makes it clear that the term "express terms and provisions" means "only the statements expressed in the articles" with respect to the particular class of shares.[8] There is little doubt that the right of appraisal ought to be given to a class of preferred shares whenever a subsequent preferred is placed senior to it, for the effect is quite as devastating as where an important change is made in the express terms. But, as yet, the right has not been incorporated in the appraisal section.

Johnson v. *Lamprecht*[9] was partially responsible for another important change in the statute. The device of a new issue of prior preferred shares had been used in this case to eliminate the payment of a large part of an accrued but undeclared dividend. The holders of the outstanding preferred were given the opportunity to exchange their present shares for the new prior preferred to be issued and to receive three-quarters of a share of common therewith to partially compensate for the loss of $20 of accrued dividends. The common stock thus tendered was admittedly worth $6. Thus, each preferred stockholder who desired to make the exchange would lose the right to $14 upon each share exchanged. The new preferred was also redeemable, whereas the old outstanding preferred was non-callable. The proper proportion having voted for the recapitalization, the court held that a minority shareholder could not enjoin the carrying out of the plan. The effect, said the court, was to place a new prior preferred ahead

[7] *Supra* note 6, at pp. 577-578. G.C. sec. 8623-4, as it then existed, had attempted to define "express terms and provisions" though, perhaps, not too clearly.

[8] G.C. sec. 8623-2(8).

[9] *Supra* note 6.

of the outstanding preferred, so that dividends would first be payable upon the new preferred before any could be paid upon those shares of the minority remaining outstanding. Before dividends might be paid to the common stockholders, however, the court made it clear that the accrued dividends upon the old preferred must first be paid.

There had been a series of cases in Delaware which had made the device used in *Johnson* v. *Lamprecht* apparently necessary. The 1927 amendment to Section 26 of the Delaware Corporation Act[10] contains a broader statement of the power to alter, amend or repeal than did the Ohio Act. There had been several attempts through charter amendment to wipe out accrued dividends in corporations formed under this statute. Two of these finally got into the court of last resort of Delaware and that court determined with finality that Section 26 was not broad enough to permit a wiping out of accrued dividends which the court thought were vested property rights.[11] Recently, however, the Supreme Court of that state has held that accrued dividends may be eliminated through a plan of merger though not through an amendment to the charter under Section 26.[12] The new provision in the Ohio Act is clear and permits the "discharge, adjustment or elimina-

[10] Sec. 26 of the Delaware Corporation Act as amended in 1927, 35 Del. Laws, c. 85.

[11] *Keller* v. *Wilson*, 190 Atl. 115 (Del. Sup. Ct., 1936); *Consolidated Film Industries, Inc.* v. *Johnson*, 197 Atl. 489 (Del. Sup. Ct., 1937). But laches may bar a remedy. *Romer v. Porcelain Products, Inc.*, 2 A. (2d) 75 (Del. Ch., 1938); *Trounstine* v. *Remington-Rand, Inc.*, 194 Atl. 95 (Del. Ch., 1937).

[12] *Federal United Corp.* v. *Havender*, 8 U.S.L.W. 168 (Del. Sup. Ct., 1940), reversing *Havender* v. *Federal United Corp.*, 6 A. (2d) 618 (Del. Ch., 1939). The Supreme Court said: "The lower court erred in declaring the merger to be void on the theory that it was 'an unauthorized attempt at recapitalization' of the parent corporation which was ineffective as to the dissenting stockholders whose right to accumulated dividends would be extinguished, under the rule announced by this court in *Keller* v. *Wilson and Co., Inc.*, 190 Atl. 115. The *Keller* case is not applicable, since it involved destruction of the right to accrued dividends by charter amendment, which was not authorized by statute, and not a merger of two corporations effected in the manner provided by statute." (8 U.S.L.W. 168, at p. 169.)

tion of rights to accrued undeclared cumulative dividends,"[13] but gives to those who desire it an opportunity to retire from the company with an appraisal as provided for by Section 8623-72.[14] Whether this is good policy is quite another thing. The Committee on Corporation Law, however, has taken the position that "in principle there is no distinction between changes of rights to dividends accrued in the past and changes operative in the future."[15] This seems pretty clearly to turn down the theory of vested contract or property rights which, as yet, no court has sufficiently explained.

While the Committee had the opportunity to make the act modern in another respect, namely, to permit corporations to be formed either by a corporation or by one natural person, it failed to do so and reenacted the former provision.[16] Why it should be necessary to have three incorporators, a majority of whom must be citizens of the United States, is a mystery which has long gone unexplained. There is no requirement that the three incorporators shall hold shares in the company or that they need continue in any capacity after filing the articles. And since corporations are empowered to hold stock without limit in other corporations, it has been customary for corporations, through their officers or attorneys, to incorporate new corpora-

[13] G.C. sec. 8623-14(3i). *Johnson* v. *Lamprecht* raised doubts as to whether the old provision was broad enough to permit, by amendment, the wiping out of accrued dividends. See also recent case of *Harbine* v. *Dayton Malleable Iron Co.*, 22 N.E. (2d) 281 (Ohio App., 1939), in which the court directly held that they could not be wiped out. *Contra*: *Vulcan Corp.* v. *Westheimer and Co.*, 14 Ohio Op. 274, 27 Ohio L. Abs. 694 (1938), appeal dismissed for want of debatable constitutional question, 135 Ohio St. 136, 19 N.E. (2d) 90 (1939).

[14] G.S. sec. 8623-14(2) and (3).

[15] Ohio State Bar Association Committee on Corporation Law, Report on Proposed Amendments to the General Corporation Act, December 26, 1938, comment following sec. 14. It is suggested that the then existing sec. 15 "probably leads to the same result." But see note 13 *supra*.

[16] G.C. sec. 8623-4. See Michigan General Corporation Act, sec. 3 which permits a corporation or a single natural person to incorporate. The statute preceding the 1927 Ohio Corporation Act required five incorporators, a majority of whom were required to be citizens of Ohio. This, perhaps, partially explains the present provision.

tions whenever subsidiaries are needed. Likewise, it is quite as possible for a citizen of Patagonia to incorporate himself by hiring a firm of attorneys who are citizens of the United States to be his incorporators, sign and file the articles, and take his subscription to stock. They drop out and leave him just as thoroughly incorporated as if he had been three, a majority of whom had been citizens of the United States. This is a place in the statute where realism is needed.

In Section 4 a paragraph has clarified the distinction between classes and series of shares.[17] The board of directors may be authorized to adopt amendments to the articles with respect to unissued or treasury shares of any class, "to fix or alter the division of such shares into series, the designation and number of shares of each series, the dividend rate, dates of payment of dividends and dates from which they are cumulative, redemption rights and price, liquidation price, sinking fund requirements, conversion rights, and restrictions on issuance of shares of the same series or of any other class or series."[18] While this gives the board a tremendous power over stock issues, it does work for flexibility in the management of the financing of the company. It should be noted, however, that power is not given the board to change the priority of any series.[19]

While Section 10 has been amended to make clear that which, by inference, must have been intended in former Section 10 by stating specifically that the incorporators (unless otherwise provided in the articles) may determine the price at which no par shares shall be subscribed, that they may

[17] G.C. sec. 8623-4(4b): "The express terms and provisions of shares of different series of any particular class shall be identical except that there may be variations in respect of any or all of the following: dividend rate, dates of payment of dividends and dates from which they are cumulative, redemption rights and price, liquidation price, sinking fund requirements, conversion rights, and restrictions on issuance of shares of the same series or of any other class or series."

[18] G.C. sec. 8623-4(4b). Compare former G.C. sec. 8623-15(a). New sec. 8623-14(h) harmonizes with new sec. 8623-4 and sec. 8623-15(a).

[19] As to the arguments in favor of what Professor Berle has called "blank stock," see BALLANTINE AND LATTIN, CASES AND MATERIALS ON CORPORATIONS (1939), pp. 380-384.

determine that par shares shall be subscribed for at a price greater than par, and that they are to fix the value of property exchanged for shares, there is still no indication that pre-incorporation subscriptions are possible. The section still provides that "the incorporators or a majority of them shall order books to be opened for subscriptions to shares of the corporation at such time and place as they may determine." While there is nothing in the act referring to pre-incorporation subscriptions, it is believed that they are quite as valid as they ever were. Since the Act is so specific in other respects, it would seem wise to make specific provision for pre-incorporation subscriptions. This should not be done, however, without a careful study of the common law decisions here and elsewhere on this perplexing problem.[20]

Section 14(1) contains a somewhat ambiguous statement which, at first glance, seems to say that if an amendment to the articles is made within that section then, even if the articles do not "permit such amendment" the only remedy is through the appraisal section.[21] At least, no other remedy is suggested. If the articles do not permit the amendment, the change would be *ultra vires* the corporation. In similar cases, courts have always permitted a stockholder to enjoin the carrying out of the act. This, it is submitted, should be the interpretation of the new section, for a statute ought to be explicit in making appraisal the only remedy if the legislative intent is meant to go that far.[22] In other words, there should be alternative

[20] See Frey, *Modern Development in the Law of Pre-Incorporation Subscriptions*, 79 U. Pa. L. Rev. 1005 (1931); Morris, *The Legal Effect of Pre-Incorporation Subscriptions*, 34 W. Va. L. Rev. 219 (1928).

[21] G.C. sec. 8623-14(1) and (3) must be read together in this type of case. Compare former sec. 8623-15 with the new section 14(1) and (3).

[22] The California statute is suggestive on this question. See *Beechwood Securities Corp., Inc.* v. *Associated Oil Co.*, 104 F. (2d) 537 (C.C.A. 9th, 1939); Ballantine and Sterling, Upsetting Mergers and Consolidations: Alternative Remedies of Dissenting Shareholders in California, 27 Cal. L.Rev. 664 (1939). The statute section is Cal. Civ. Code (Deering, 1937), sec. 369(17). See also Michigan General Corporation Act. (1931), secs. 44, 54, 15 Mich. Stats. Ann., secs. 21.44, 21.54.

remedies by appraisal or by injunction. If the articles do expressly or by implication provide for such an amendment as is contemplated under Section 14(1), there is no remedy by appraisal.[23] A careful draftsman will not fail to provide expressly for the changes contemplated by this section for, hard as it may be upon the shareholder who wakes up one fine day to find himself holding the bag, the corporation must protect itself against the day when it may not be able to pay those who dissent and demand appraisal.

New Section 15 takes up the procedure by which amendments to corporate articles are made. There must be an "affirmative vote of the holders of shares entitled under the articles to exercise at least two-thirds of the voting power of the corporation on such proposal (or if the articles so provide or permit, a greater or lesser proportion but not less than a majority of such voting power), and by such vote of the holders of any particular class or classes of shares as may be required by the articles and by the provisions, when applicable, of subdivision (4) hereof."[24] Under subdivision 4 of this section, the holders of shares of a particular class, whether or not there are limitations or restrictions upon their voting rights, are given the right to vote as a class in the enumerated cases.[25] This section contemplates but one vote, rather than two, but this vote must comply with the provisions of the statute and of the articles.[26] The term "voting power" in this section is likely to confuse, but the Committee, in its comment following this section, has said: "In the event that the articles are silent with respect to voting power, then each share would be entitled to one vote. The language here used aims to cover the situation where, by a provision in the articles, each share of a given class

[23] See Report on Proposed Amendments, etc., *supra* note 15, Comment following sec. 14. For somewhat similar phrases see sec. 14(3); sec. 72.

[24] G.C. sec. 8623-15(3).

[25] See G.C. sec. 8623-15(4), (a)-(f).

[26] See Report on Proposed Amendments, etc., *supra* note 15, Comment following sec. 15.

may have a plural vote or where a given class is vested under the articles with a given percentage of the total voting power of the corporation."[27] A major change has also been made in the proportion necessary to pass an amendment in a class vote under subdivision 4. The previous provision had required a majority vote. The new provision requires at least a two-thirds majority of the class entitled to vote though, if the articles expressly so provide, there may be a greater or lesser proportion, but not less than a majority of such shares of the particular class. Again, good drafting will see to it that a majority vote is all that is necessary.

One other important addition has been made to this section. It is provided that "if the proposed amendment would authorize any particular corporate action which, under any other section of this act or the existing articles, could be authorized or done only by or pursuant to a specified vote of shareholders, then such amendment must be adopted by a vote not less than the vote so specified." It seems only just that if the articles permit amendments by majority vote, as they may, and if a specific provision in the articles permits consolidation or merger only by a three-fourths vote, the articles should not be changed in this respect except by a three-fourths vote.[28]

Under new Section 15 (5) the convenience of adopting amended articles as well as amendments to the articles is provided for. Under this section it is now possible to adopt amended articles so that they will include not only the new amendments made but also all amendments that may have been previously made. This, no doubt, will be a considerable convenience to many corporations which have a long record of amendments.

Section 15a is a partially new section framed to put the Ohio law in line with the new Bankruptcy provisions.[29] The comment of the Committee is enlightening on this point: "The

[27] *Supra* note 26.
[28] See *supra* note 26, Comment.
[29] See sec. 8623-15(2).

purpose is to facilitate reorganizations under the Bankruptcy Act as amended. In the absence of a provision such as subdivision 2 a reorganization plan properly adopted and confirmed in a bankruptcy court might be defeated because the shareholders would neglect or refuse to take appropriate action under the General Corporation Act. For example, the plan of reorganization might require an amendment to the articles in order to provide for new classes of shares. The shareholders of the corporation may have lost interest in the reorganization because the corporation has been found to be insolvent or because holders of two-thirds of the shares entitled to vote may not be satisfied with the plan. The Bankruptcy Act provides for hearings at which the shareholders can be heard. There is no point in requiring any additional action by shareholders after the court has approved the plan. Under subdivisions 2 and 3 the plan may become effective upon the filing of such certificate as may be provided for in the plan itself and in the order of the court. In part the above revision is based upon similar statutes in New York and Delaware."[30] The trustee appointed in reorganization proceedings, or if no trustee was appointed, the officers of the corporation, or a master, referee, or other representative appointed by the court has the power to set the plan in motion.[31] All that is necessary is that one of them be directed by the decree or order of the court. No further act by directors or shareholders is necessary. While under a reorganization effected under the Ohio statute dissenting shareholders are given appraisal remedies, if the reorganization is effected pursuant to the Bankruptcy Act, dissenters are given only such rights and remedies as the plan of reorganization calls for.[32] This indicates another way out in many reorganizations where dissenting shareholders might be able to prevent the reorganization due to inability of the corporation to pay for the appraised shares.

[30] See Report on Proposed Amendments, etc., *supra* note 15, Comment following sec. 15(a).

[31] Sec. 15a (2a).

[32] Sec. 15a(4).

Section 17 has been considerably simplified and clarified by restatement. Under this section the board of directors will now have complete power (unless otherwise provided by the articles) to issue no par value shares and to fix the consideration for them. This has been the normal procedure where no par shares are authorized, the articles making special provision to the effect that the directors shall have this power. Being customary, a statutory enactment of the custom makes the best kind of law.

It is important to note that throughout the new amendments the clause "Unless otherwise provided in the articles" continually reappears. It reenforces the idea that the articles constitute the working contract of the shareholders and that the particular power granted is subject to that contract if so desired by the shareholders. Section 20 contains this clause to cure a defect in former Section 20 which gave an absolute right to the directors to grant options. This is as it should be, particularly in case of share-purchase options, for these have many dangers if granted without restriction.[33] Former Section 20 also placed no limitations on options to purchase stock authorized in the future. The new section specifically limits such options to "any authorized class or classes."

Important changes have been made in Section 31. The former section required that the certificate for shares state, among other things, "the number of each class of shares authorized to be issued . . . at the date of such certificate." Since the number of shares authorized could be changed by amendments, cancellations by redemption, etc., it was frequently impossible, without much trouble, to make a truthful statement in this respect. The new section does not require this statement.

Section 31 before the 1939 amendments also required a statement on the certificate "of all of the terms and provisions of each class of shares, or a summary thereof and a reference

[33] See Berle, Corporate Devices for Diluting Stock Participations, 31 Col. L. Rev. 1239, at 1260-1263, Stock Purchase Warrants; Berle, Investors and the Revised Delaware Corporation Act, 29 Col. L. Rev. 563, at 570 (1929).

to the articles." In case many classes were outstanding, this meant the printing of the terms in such small print, due to the limited size of a share certificate, that the human eye unassisted could not read them. Section 31 as amended requires no statement of terms and provisions if the stock is not classified,[33a] and if classified it requires a statement on face or back of the designation of the class and series, and of the express terms and provisions of that class and series *or* a summary of them. As to other classes which are authorized, a statement that their terms and provisions are on file at the corporate office or with the transfer agent suffices. This section as amended complies with the requirements of the New York Stock Exchange and seems thoroughly adequate.

The Committee had some well-grounded fears that the limited pre-emptive right given in Section 35 of the old statute was not as well guarded as it ought to be. It was pointed out that, after the shareholders with pre-emptive rights had been offered the new issue and had refused to take it upon the terms offered, the directors might offer it to outsiders upon more advantageous terms.[34] So the present section was enacted to take care of that possible difficulty. The shares must be offered to outsiders at not less than they had been offered to the shareholders with pre-emptive rights, with an allowance for necessary expenses of sale, underwriting, etc.

Section 37, the "stated capital" section, has been reworded and added to, resulting in considerable improvement. By the definition in subdivision 8 of this section, the term "outstanding shares" includes treasury shares, and so "stated capital" includes treasury shares no matter how acquired. The old section so defined it.[35] Of course, treasury stock is in no true sense a liability nor can it be considered as an asset if we look at it realistically.

[33a] *I.e.*, "If the corporation has authorized only one class of shares, then no express terms and provisions need be stated." Report on Proposed Amendments, etc., *supra* note 15, Comment 3 following sec. 31.

[34] See Report on Proposed Amendments, etc., *supra* note 15, Comment following sec. 35.

[35] See new sec. 37(2), (3) and (8). See old sec. 37(1) and (2).

It is a liability only when it is reissued and whatever is then obtained for it becomes an asset for the first time. While accountants have classified treasury stock as current assets, investment assets, unclassified assets, as a deduction from stated capital, as a deduction from aggregate net worth, and as a deduction from earned surplus, "It has been pointed out that the proper method of showing treasury shares is as a deduction from earned surplus at the cost of acquisition, if any. It is not sufficient merely to indicate that the net worth (which includes capital and surplus) is diminished, but it should also be shown what subdivision of net worth is affected, *viz.* the surplus available legally for such purchase."[36] The Committee quotes from Mr. Hills' article[37] that "stated capital is solely a quantum, a marginal or minimum amount which must be kept in existence and be maintained as a condition precedent to the withdrawal of assets to or for the benefit of shareholders."[38] The purchase of its own shares out of a proper fund does not in fact reduce that "quantum" of which Mr. Hills speaks. Under the statute, the creditor has no complaint for he is protected by the definite limitations upon the purchase of its own shares by the corporation.[39] Furthermore, Section 41(9) as amended specifically prohibits treasury shares from being considered as an asset in the determination of the excess of assets over liabilities plus stated capital for the purpose of declaring and paying dividends, purchase of its own shares or making any other distribution to its shareholders, a wise prohibition but quite unnecessary if treasury shares are correctly carried, as indicated above, on the balance sheet.

One other arguable effect of the amendment just discussed (Section 41(9), paragraph 2) is this. Under old Section

[36] Ballantine and Lattin, *op. cit. supra*, note 19, at p. 522. Note on Accounting for Treasury Shares on the Balance Sheet; Graham and Katz, Accounting in Law Practice, p. 156 (1932).

[37] Hills, A Model Corporation Act, 48 Harv. L. Rev. 1334, at 1360 (1935).

[38] See Report on Proposed Amendments, etc., *supra*, note 15, Comment following sec. 37.

[39] See sec. 41.

8623-41 it was reasonably arguable that, except in case of a purchase of its shares under subdivision (c), shares could be purchased by the company out of capital, as in Massachusetts and Wisconsin.[40] That is a surplus created by deducting total liabilities, not including stated capital, from total assets could be used in the purchase of its own shares unless "there is reasonable ground for believing that the corporation is unable or, by such purchase, may be rendered unable to satisfy its obligations and liabilities.[41] Does the addition of this new paragraph[42] have the effect of requiring that, in all cases of purchases authorized under Section 8623-41, the stated capital must be considered as a liability to be deducted along with other liabilities from the total assets? From the position of this new paragraph in the section, it seems reasonable to believe that a purchase by a corporation of its own shares cannot be made out of any fund short of a surplus as defined in subdivision (8) of Section 41.

Section 39, which concerns the reduction of stated capital, starts with the words: "Except as otherwise permitted by this act in the case of consolidation, merger or reorganization, the stated capital of a corporation shall be reduced only as permitted by this section . . ." Former Section 39 made no exceptions, stating that stated capital could *only* be reduced as provided for in this section. Another difficulty that has been remedied is that which, under the former section, made it difficult to reduce

[40] Subdivision (c) is the only subdivision in the old statute that says anything about purchasing out of a surplus from which a dividend might have been declared. See *Scriggins* v. *Thomas Dalby Co.*, 290 Mass. 414, 195 N.E. 749 (1935); *Barrett* v. *W. A. Webster Lumber Co.*, 275 Mass. 302, 175 N.E. 765 (1931); *Rasmussen* v. *Schweizer*, 194 Wis. 362, 216 N.W. 481 (1927); *Koeppler* v. *Crocker Chair Co.*, 200 Wis. 476, 228 N.W. 130 (1929). See also Note, *May a Corporation Purchase Its Own Stock Out of Capital?* The Problem Revisited, 27 Georgetown L.J. 217 (1938); Ballantine and Lattin, *op. cit. supra*, note 19, at pp. 501-502.

[41] G.C. sec. 8623-41, next to last paragraph in the section.

[42] G.C. sec. 8623-41(9), par. 2, reads: "In the determination of the excess of a corporation's assets over its liabilities plus stated capital, for the purpose of declaring and paying a dividend, purchasing its own shares or making any other distribution to shareholders, treasury shares shall not be considered as an asset of the corporation."

stated capital by converting shares of a greater par value into shares of a less par value. Subdivision 4 of the new section specifically provides for this. Subdivision 9 of this section provides that shares converted or retired under the provisions of Section 39 are to be considered as authorized but unissued shares, thus filling another breach left open in the former section. Subdivision 11 provides for an optional filing of the certificate of cancellation where shares, by their terms, upon conversion, redemption or purchase, are to be cancelled. There is a prohibition against re-issue under such circumstances. It is necessary, however, that the certificate be filed if cancellation is desired. The Committee points out that the former section contained a compulsory requirement for filing which was often violated. Hence, the new provision.

The purchase of its own shares by a corporation, troublesome at common law and somewhat baffling under modern statutes, receives a clearer treatment in amended Section 41, subdivision 1 providing for cases where the articles authorize the redemption of shares, subdivision 2 including the case of repurchase from a subscriber who has not paid for his shares in full, and subdivision 9, paragraph 2, which prohibits considering treasury shares as an asset for the purposes already discussed.[43] Subdivision 9 also provides for the purchase of shares pursuant to a resolution of reduction of stated capital as provided for in Section 39.

Section 47 has been amended to provide for the record dates of shareholders' meetings which have been called in the unusual ways permitted by Section 43, that is, by a majority of the board acting without a meeting, by persons holding 25 per cent of all the voting shares, or by other officers or persons designated by the articles. The new section permits the record date to be set by the person or persons authorized to call the meeting. The setting of record dates is extremely important in a number of cases pointed out by the Committee in the Comment under this

[43] See p. 12, *supra*.

section. The defect is now cured. Also, subdivision 1 provides that the board may fix a date "which shall not be a past date." There was some doubt before this amendment as to whether a record date might be a past date. At least, the matter of judicial interpretation is eliminated by this section.

Requirements of notice, the calling of meetings of the board and of adjournments of such meetings are provided for in Section 57. This section is chiefly for those corporations which do not have codes of regulations. It was the Committee's intent "to make the act sufficiently complete to permit a corporation to carry on its business in the event that there should not be a code of regulations or it should be incomplete in details.[44]

By Section 67 Ohio corporations are now authorized to merge or consolidate with corporations of other states whose laws so permit. There has been much need for this provision and it is surprising that the 1927 Act did not provide for this. "Two features are provided for in this amendment that are in advance of the statutes of other states. One is the provision permitting the effective date of a merger or consolidation to be fixed in the agreement and the other is the provision continuing the life of constituent corporations for the execution of deeds and instruments necessary completely to vest title. These provisions should be particularly useful in the merger or consolidation of Ohio and foreign corporations."[45] The Committee also informs us that a careful study of Section 112 of the Internal Revenue Act of 1936 and Treasury Regulation No. 94 was made before drafting this provision.[46] Section 68 has likewise been amended to state the effect of the consolidations authorized in the preceding section.

A copy of the articles or amended articles, filed with the secretary of state and certified by him, is now made *conclusive* evidence (except as against the state) of incorporation under

[44] Report on Proposed Amendments, etc., *supra*, note 15, Comment following sec. 57.

[45] *Ibid.*, Comment following sec. 67.

[46] *Supra*, note 45.

the Ohio laws.[47] This would seem to make obsolete the doctrine of corporations *de facto*. Nothing of value will thereby be lost but much will be gained.

A few other amendments were made in the last legislative session, but they are not as clearly significant as the ones discussed.[48] By and large, the statute has been made more workable and has cumulatively added to the idea that the relationship of shareholder to corporation is merely one of contract which, due to the shareholder's agreement in the beginning, permits many major changes which will affect his position as a shareholder. In the most important changes, he is permitted an exit by way of the appraisal section, but even here the phrase "unless the articles otherwise provide" frequently raises an obstacle. It seems very clear that no provision has yet confined the shareholder's remedy to appraisal in cases where the authority of the majority has been exceeded or where the majority is exercising its power fraudulently. A recent case has bolstered up this idea.[49]

It frequently happens that, no matter how carefully a statute is framed, questions are presented for judicial clarification. The well-known and elusive "legislative intent" is sought to solve the matter. The legislature not having left any record of its intent, the court is thrown upon its own resources to guess what that intent might possibly have been. And "guess" is the right word for this judicial process. The Corporations Committee has left a valuable, formal, printed record in the form of the Report frequently cited in this paper which is accessible and which was available to the legislature for the asking. This Report ought to be consulted when it is doubtful what the legislature meant in these new enactments. It is the source material for any judge who has a respect for realism in the judicial process. And it ought likewise to be the strongest tool available to the lawyer in presenting his case of probable legislative intent.

[47] G.C. sec. 8623-117.

[48] See secs. 5, 40, 74, 76, 101, 114, 116, 118, 120, 132.

[49] *Johnson* v. *Lamprecht*, *supra*, note 6, at p. 578.